229429

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS & COMPANY Complainant v. NORFOLK SOUTHERN RAILWAY COMPANY Defendant	)	Docket No. NOR 42125

REPLY IN OPPOSITION TO THE
MOTION TO COMPEL OF NORFOLK SOUTHERN RAILWAY COMPANY

E.I. du Pont de Nemours and Company ("DuPont") submits this reply in opposition to the motion to compel filed by Norfolk Southern Railway Company ("NS") on April 20, 2011 ("Motion"). The Board's regulations expressly protect litigants from unduly burdensome discovery.[1] To determine whether the discovery burden on a litigant is undue, the Board applies a balancing test, weighing the discovery burden against the value of the discovery.[2] Accordingly, "discovery may [] be denied if it would be unduly burdensome in relation to the likely value of the information sought."[3] NS Request for Production No. 20 ("RFP 20") creates precisely the type of imbalance that 49 C.F.R. § 1114.21(c) proscribes, because it imposes a substantial burden on DuPont for information that is of marginal value to NS at best. Therefore, the Board should deny the NS Motion.

[1] 49 C.F.R. § 1114.21(c)
[2] *Waterloo Ry.*, STB Docket No. AB-124 (Sub-No. 2), slip op. at 3 (served May 6, 2003).
[3] *Id*

I. BACKGROUND

RFP 20 seeks the production of documents related to alternative transportation that DuPont used more than a decade ago during an extreme and prolonged period of service failures caused by the NS integration of Conrail. Specifically, RFP 20 states:

> Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."[4]

The request stems from claims that DuPont made in a federal civil action filed against NS in 2000 for damages related to NS service failures following its joint acquisition and partition of Conrail with CSX Transportation, Inc. ("CSXT"). In the complaint, DuPont asserted that it had to secure alternatives to NS transportation as a consequence of NS service failures and sought damages for the *much higher* costs of those alternatives.

DuPont responded to RFP 20 as follows:

> DuPont objects to this RFP to the extent it requests documents that are privileged or otherwise protected from discovery. DuPont objects to this RFP as overbroad and irrelevant because it seeks information on transportation options used by DuPont in a unique and extreme situation that occurred over a decade ago. Subject to and without waiving any of its General Objections, Objections to Definitions, Objections to Instructions, or specific objections, DuPont responds that it is not in possession of responsive documents.[5]

[4] Ex. A at 2.
[5] Ex. A at 2.

DuPont also informed NS that it no longer has any documents responsive to RFP 20 in its possession, except for a small number of documents protected by the attorney-client privilege and the work product doctrine.

At the request of NS, but without waiving its objections to production of responsive documents, DuPont asked its outside law firm in the 2000 litigation, CliffordChance, whether it had retained any of its litigation files. CliffordChance informed DuPont that it possessed approximately 100 boxes of documents from the litigation in off-site storage and that another 16 boxes had been taken by attorneys who had subsequently left the law firm. DuPont informed NS of these facts and reasserted its objections to RFP 20.

DuPont also further elaborated upon the facts underlying its objections. First, because these documents are attorney records prepared for litigation, many if not most of them will be privileged or protected by the attorney-client privilege and/or the attorney work product doctrine, which would require a time-consuming, expensive and burdensome review. Second, because the alternative transportation alleged in the 2000 litigation occurred over a decade ago and was in response to NS service failures, not unreasonable rates, the potential relevance of such documents was far outweighed by the burden.

II. THE BURDEN OF RESPONDING TO RFP 20 IS SUBSTANTIAL

NS blithely presumes that DuPont's burden objection is "nonsense."[6] Instead of DuPont engaging its former outside counsel to review the 100 boxes of documents in their possession, NS suggests that DuPont can avoid this burden by reviewing the documents in-house or through its STB litigation counsel. This presumption has multiple flaws.

Regardless who reviews the documents, the expense will be considerable. DuPont cannot simply copy all 100 boxes and hand them over to NS. To the extent that these 100 boxes of

[6] Def.'s Mot. 6.

documents contain responsive information, the information is intricately interwoven with privileged communications and attorney work product. Accordingly, prudence demands that DuPont review each document with heightened scrutiny, assess the protection to which the document is entitled, and redact, produce, or withhold the document. This is a very detailed and time consuming task considering the voluminous amount of documents that must be reviewed and the certainty of extensive attorney-client communications and work product. The burden is far greater than is incurred in a typical review of business documents.

Using DuPont's former counsel is the most efficient approach to conducting such a sophisticated review. DuPont's former counsel is more familiar with these documents than DuPont's STB legal team and DuPont in-house legal staff, most of whom were not with DuPont in 2000. Because of their greater familiarity with their own documents, DuPont's former counsel is in the best position to identify their own attorney work-product and privileged communications and are less likely to mischaracterize the documents. Despite these efficiencies, a review by DuPont's former counsel will still be very expensive and still would require a second review by DuPont's STB counsel, who must be familiar with the contents of the documents for purposes of this litigation. Regardless, shifting the review to other counsel or DuPont personnel will merely eliminate the efficiencies of using DuPont's former counsel, not the time or expense.

III. RFP 20 SEEKS INFORMATION OF LITTLE VALUE TO NS'S CASE.

The information requested in RFP 20 will have little value to NS in this proceeding for two reasons. First, because the information is over a decade old, it will have little bearing on the availability and cost of transportation alternatives today. Second, DuPont employed transportation alternatives in 2000 in response to extremely deficient rail service, not as a cost-effective, competitive alternative to rail service. The very limited value of this information is far outweighed by the burden to DuPont of producing it.

The NS Motion utterly fails to address temporal relevance. NS baldly asserts that it is entitled to discovery of alternative transportation used by DuPont in 2000 because actual use is relevant to whether that alternative is feasible and effective.[7] That argument, by itself, would entitle NS to similar discovery of DuPont at any time in DuPont's history. Such a result clearly is unreasonable. Temporal considerations go to the weight and hence the value of the evidence, and the value of the evidence must be balanced against the burden of production. For that very reason, DuPont and NS agreed to certain temporal limitations on market dominance discovery in this case.

It is particularly ironic for NS to be seeking evidence of market dominance from DuPont as far back as 2000 when NS itself objected to any market dominance discovery of it prior to 2008.[8] At a discovery conference between the parties, NS and DuPont did agree to produce responsive information on market dominance dating back to 2006.[9] Even this concession does not come close to bridging the gap to 2000.

The parties agreed to limit the discovery of market dominance evidence to 2006 for a very good reason: this case concerns rates that NS imposed beginning June 1, 2009. Market dominance is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies."[10] This standard requires an absence of effective competition substantially contemporaneous with the challenged rate. Accordingly, the Board's market dominance inquiry focuses on "whether there *are* any feasible transportation

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[7] Def's Motion at 4-5.
[8] NS Gen. Obj. 23. ("NS objects to DuPont's failure to limit its requests to a relevant time period as overbroad and unduly burdensome. . . . Subject to, and without waiving this objection, unless otherwise indicated, NS's responses will cover the period from 2008 to 2010."). Not once did NS specifically waive this objection.
[9] Ex. B at 2, 4.
[10] 49 U.S.C. § 10707(a).

alternatives that could be used for the issue traffic."[11] The more distant in time, the less valuable the information on alternative transportation becomes.

Moreover, the unique and extreme circumstances surrounding DuPont's use of alternative transportation in 2000 further lessens the value of the particular information sought in RFP 20. In 1998, the Board approved the acquisition and division of Conrail by CSXT and NS.[12] During the implementation, major service and operational problems plagued the newly-integrated system, forcing shippers to use alternative transportation to keep their supply chains from failing. NS service crumbled, effectively severing DuPont from raw materials and its customers. To keep its plants running and to supply its customers, DuPont had no choice but to use alternative transportation, regardless of costs, because the consequences of not doing so would have been far greater. DuPont's use of alternatives to NS was completely unrelated to competition from those alternative modes, much less "effective" competition. Indeed, the very reason for DuPont's 2000 lawsuit against NS was to recover DuPont's *much higher* alternative transportation costs. Thus, for NS to point to DuPont's use of alternative transportation in response to the service meltdown following the Conrail merger as evidence that DuPont could just as easily use that alternative today ignores the fact that DuPont had no other choice—the transportation that DuPont used was not an alternative to NS transportation; it essentially was the only transportation.

Further, NS has little need for this information because DuPont is responding to multiple other NS requests for information regarding DuPont's use of alternative transportation from 2006 to the present. These requests cast a broad net, as the following interrogatory illustrates:

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[11] *E.I. duPont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099, slip op. at 2 (served June 30, 2008) (emphasis added). The term "feasible" is not as broad as NS suggests—the statutory requirement of "effective competition" constrains its meaning. As the Board noted in *DuPont*, "the mere physical possibility of transporting [by an alternative] does not mean there is effective competition." *Id.* at 5.

[12] *CSX Corp*., 3 S.T.B. 196 (1998).

> Identify and describe with specificity all Alternative Transportation that DuPont has considered, studied, analyzed, or is aware of, which it has used or might use to transport one or more of the Issue Commodities between the Issue Origins and the Issue Destinations (including intermodal or multimodal transportation, and including options that would or could require the construction of additional infrastructure or facilities such as truck transloading facilities or barge docks), and identify and describe with specificity any Document(s) and/or Communication(s) relating thereto.[13]

Certainly, if the alternative transportation that DuPont used in response to NS service failures in 2000 is an effective competitive alternative, DuPont would have "considered, studied, analyzed, or [been] aware of it" in the five years prior to pursuing this rate complaint against NS.

IV. THE BURDEN OF RFP 20 MUST BE ASSESSED ON ITS OWN MERIT

The NS attempt to justify the burden it is imposing on DuPont by comparing it to the general discovery burdens associated with a stand-alone-cost ("SAC") case ignores the nature of the protection that the Board affords from unduly burdensome discovery. It does not matter how many requests DuPont has served upon NS or how many hours NS is spending to respond to DuPont's SAC requests. The Board weighs the burden and value of each discovery request on its individual merits, not on the basis of whether one party may bear a heavier discovery burden than the other in the aggregate. This tired plea for sympathy completely ignores that the burden of each of DuPont's discovery requests of NS is not undue when compared to the value of the information sought.

The Board's predecessor clearly understood, and so held, that "*shippers* may require substantial discovery to litigate a case under [constrained-market pricing], and [the Board is] prepared to make that discovery available to them."[14] This statement acknowledged that the

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[13] Def.'s Interrog. # 5.

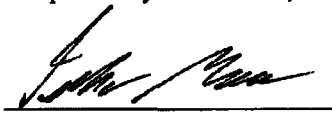
[14] *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985) (emphasis added). When using this quote to support its assertion that it needs the information, NS conveniently left out the portion of the quote that limits its application to "shippers." *See* Def.'s Mot. 6.

greater discovery burden in rate cases necessarily fall upon the railroad. This statement was not *carte blanche* for railroads to serve any amount of discovery upon shippers, no matter how tangential, so long as the railroad's overall burden is greater. DuPont, like most shippers in a SAC case, happens to have a greater need for discovery than NS, because there are many more SAC issue than market dominance issues. Furthermore, DuPont is more than shouldering its fair share of the discovery burden in this case when it comes to relevant market dominance requests. It is irrelevant that the overall discovery burden on NS, as it relates to SAC, may be proportionately larger than the market dominance discovery burdens upon DuPont.

V. CONCLUSION

NS is fishing for marginally relevant information of little value to it, but at a considerable expense to DuPont. NS does not attempt to justify the burden upon DuPont of responding to RFP 20 by referencing the value of the information to NS. Instead, NS presumes that it is entitled to the discovery regardless of its value, and that DuPont's sole recourse is to incur the burden and argue the weight of the evidence on the merits. But, when responding to a certain discovery request is unduly burdensome, the value of the evidence is a highly relevant consideration as to whether such discovery should be had at all. For the foregoing reasons, DuPont respectfully requests that the Board deny NS's motion.

Respectfully submitted,



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May 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of May 2011, I served a copy of the foregoing via e-mail and first class mail upon:

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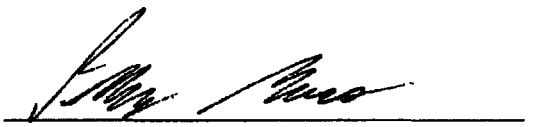

Jeffrey O. Moreno

Exhibit A

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS & COMPANY Complainant v. NORFOLK SOUTHERN RAILWAY COMPANY Defendant	)	Docket No. NOR 42125

OBJECTIONS AND RESPONSES TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Complainant, E.I. DuPont de Nemours & Company ("DuPont"), hereby submits its Objections and Responses to the First Set of Interrogatories and Requests for Production of Documents to Defendant, Norfolk Southern Railway Company ("NS"). DuPont's responses to the Interrogatories and Requests for Production are based upon information presently known. Because DuPont continues to investigate the facts and information relating to the issues in this case, DuPont reserves the right to modify and/or supplement any of its responses as the existence of additional responsive information becomes known.

The following General Objections, Objections to Definitions, and Objections to Instructions are incorporated into the specific response and/or objection to each Interrogatory and Request for Production of Documents.

GENERAL OBJECTIONS

1. DuPont objects to each Interrogatory and Request for Production to the extent that it seeks information protected from disclosure by any applicable privilege, quasi-privilege, doctrine, or any other protection from discovery or disclosure, including, but not limited to, the attorney-client privilege and the attorney work-product doctrine. Any production of privileged

Request for Production 20. Produce all documents, including contracts, studies, analyses, and communications, referring or relating to DuPont's use of Alternative Transportation as claimed by DuPont in its complaint filed against NS on September 1, 2000 in the United States District Court for the Eastern District of Virginia in docket no. 00-cv-1489, including but not limited to documents concerning DuPont's claims in that case that it "secur[ed] substitute rail transportation"; "secur[ed] transportation by other modes, including truck and barge"; "modif[ied] its facilities to accommodate new modes of transportation"; and "intall[ed] additional loading and unloading equipment."

Response. DuPont objects to this RFP to the extent it requests documents that are privileged or otherwise protected from discovery. DuPont objects to this RFP as overbroad and irrelevant because it seeks information on transportation options used by DuPont in a unique and extreme situation that occurred over a decade ago. Subject to and without waiving any of its General Objections, Objections to Definitions, Objections to Instructions, or specific objections, DuPont responds that it is not in possession of responsive documents.

Request for Production 21. Produce all documents, data, or information identified or referenced in your responses to NS's Interrogatories, and all documents or other information you reviewed, consulted, considered, or relied upon in developing or preparing those responses.

Exhibit B

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CINCINNATI COLUMBUS NEW YORK

March 14, 2011

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Re: STB Docket NOR 42125, E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company

Dear Paul:

This letter reflects the understanding of E.I. du Pont de Nemours and Company ("DuPont") regarding the substance of our discovery conference with Norfolk Southern Railway Company ("NS") on March 4, 2011. During the conference, the parties resolved multiple issues with respect to NS's responses to DuPont's discovery requests and agreed upon procedures for addressing follow-up matters as information is produced by NS.[1] Please respond within 10 days of receipt of this letter if anything in this letter conflicts with your understanding of any of the issues that we discussed. DuPont will deem any failure to respond as concurrence with the accuracy of this letter.

A. General Matters

With respect to general matters, we have agreed to the following:

- **Instruction 3**: PDF is an acceptable computer readable format only where it is a native format. If NS is unable to export responsive data from proprietary software, NS will notify DuPont of the scope of responsive data that it cannot produce. If NS withholds the production of any software or computer programs based upon licensing agreements or intellectual property laws, NS will identify such programs and produce the pertinent licensing agreements.

- **Sensitive Security Information ("SSI")**: NS will produce documents with SSI redacted where feasible. If redaction is insufficient to remove the SSI character of a document, NS will withhold the entire document. At this time, NS is withholding all TIH routing information and other responsive information, including traffic tapes, as SSI. The parties have presented the SSI issue to the Surface Transportation Board ("Board"), which is seeking concurrence from the agencies that regulate the SSI. Upon receipt of the approval and concurrence, NS will not use SSI as a defense for withholding or redacting

[1] As noted at various points throughout this letter, some of the agreements also pertain to NS discovery of DuPont.

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any documents. DuPont reserves its right to object to the withholding of SSI and the delay caused by seeking agency input on the SSI classification.

- **TCS/TDIS**: NS will not withhold or redact documents based on its objections to the production of information regarding Triple Crown Services ("TCS") and Thoroughbred Direct Intermodal Services ("TDIS"). NS reserves its right to raise a relevance objection to the use of these documents.

- **Date Restrictions**: NS and DuPont have mutually agreed that their responses to requests for market dominance information will include information from 2006 to the present, unless a discovery request is explicitly restricted to a shorter time period (e.g., 2008-2010). For stand-alone cost ("SAC") discovery requests, NS will produce responsive AFEs back to 2007 where DuPont has requested information from 2007 to the present. Where DuPont has requested information prior to 2007 or without a date restriction, NS will produce responsive AFEs that were in effect as far back as 2007, except where noted otherwise in this letter. If after reviewing this AFE production DuPont believes that information from additional years is necessary, NS will consider such requests from DuPont, and if NS refuses, NS shall not object to a DuPont motion to compel as untimely.

- **Motions to Compel**: Where a determination of the need to file motions to compel cannot be made until after a party has received and had sufficient time to review responsive information, a motion to compel may be timely filed within 20 days after the producing party has informed the requesting party that its production as to a specific discovery request is complete. The parties agree to grant reasonable requests for extension of this period if more time is necessary to review the items produced. The parties shall endeavor to complete their production so that motions to compel can be filed by the close of discovery on June 30, 2011. Either party may make a motion to compel after the close of discovery only with respect to items it received after discovery closed or less than 20 days before closing.

B. Specific Discovery Requests

In order to minimize duplication of the general categories addressed in Part A., above, this part does not attempt to identify every individual discovery request that may be encompassed by one of those categories. Therefore, failure to identify a specific discovery request in this part should not be construed to exclude such request from any otherwise applicable category in Part A.

- **Interrogatory 10**: NS has confirmed that it is not withholding information based on its date objection.

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March 24, 2011

By First Class Mail and Email

Jeffrey O. Moreno
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Re: E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co., STB Docket NOR 42125

Dear Jeffrey:

We are writing to respond to your March 14, 2011 letter outlining E.I. du Pont de Nemours & Co.'s ("DuPont's") understanding of the agreements made at the March 4, 2011 discovery conference in the above-referenced proceeding. While Norfolk Southern Railway Co. ("NS") concurs with the majority of the understandings outlined in your letter, there are a few areas in which our understanding of the respective agreements differs from those stated by you. Those differences are detailed below. This letter also details NS's understanding of the parties' agreements regarding DuPont's responses to NS's discovery requests. Please contact us within 10 days of receipt of this letter if any statements in this letter conflict with your understanding of the parties' agreements. If you do not respond, we will assume that you accept the accuracy of the statements made in this letter.

I. NS's Responses to DuPont's Discovery Requests

Except as noted in the bullet points below, NS confirms that DuPont's March 14 letter presents a generally accurate summary of the parties' agreements as to NS's responses to DuPont's discovery requests. NS makes the following corrections and additions to the summary of agreements in DuPont's letter:

- **Motions to Compel:** The "Motions to Compel" paragraph on page 2 of your letter is largely accurate, but it does not completely accord with NS's understanding of the parties' agreement. Specifically, NS agreed that, where a determination of the need to file a motion to compel cannot be made until after the party has reviewed responsive information, a motion to compel may be timely filed within 20 days of the production of that information. NS did not agree to provide notice that production has been completed

or that the time for filing motions to compel would not begin to run until such notice was provided.[1]

- **Interrogatories 20 and 21:** In its summary of the parties' agreements as to "Instruction 3," DuPont states that NS has agreed to produce any licensing agreements for software programs that it is withholding as a result of licensing agreements. This does not reflect NS's understanding of how the parties agreed to resolve DuPont Interrogatory 21 and RFP 28, which ask NS to describe and produce seventeen separate software programs. NS's objection to these requests is not based solely on licensing agreements, but rather on the fact that production of "working copies" of seventeen software programs is not necessary for DuPont to prepare SAC evidence and that therefore these requests are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. That said, NS has agreed to provide descriptions of these programs in response to Interrogatory 21. If, after reviewing those descriptions, DuPont determines that it has a legitimate, reasonable need for NS to produce a "working copy" of one or more of these programs, and DuPont provides NS with an explanation of the grounds for such need, NS will consider DuPont's request at that time.

- **Date Restrictions:** NS agrees with the bulk of the "Date Restrictions" paragraph in the March 14 letter. However, NS wishes to clarify the meaning of the final clause of the last statement which states that "NS shall not object to a DuPont motion to compel as untimely." In the event that NS refuses a future request from DuPont to produce documents from a broader time period, NS will not object to the timeliness of a motion to compel filed within 20 days after NS informs DuPont of its refusal to produce.

- **Request for Production 45:** NS advises that cycle times can be derived from the traffic files that NS will be producing in response to DuPont's other discovery requests. These documents will be sufficient to show cycle times.

- **Requests for Production 51 and 52:** NS will produce responsive documents in its possession, custody, or control, including traffic files and train movement records. NS will also be producing locomotive equalization reports in response to DuPont's Second Set of Discovery Requests.

- **Request for Production 60-64:** The paragraph in DuPont's letter titled "Request for Production 60-64" appears to contain a typographical error in that it includes RFP 60. RFP 60 does not present the time period issues presented by RFPs 61-64. NS assumes that this paragraph of DuPont's letter is meant to apply only to RFPs 61-64.

[1] The parties' agreements as to motions to compel apply equally to motions filed by either DuPont or NS.